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IN THE

Supreme Court of the United States

October Term, 1970.

No. 446

TRIPOLI COMPANY, INC.,

Petitioner,

v.

WELLA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

WELLA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner Tripoli Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment on rehearing of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 27, 1970. In a 4:3 decision the Court *en banc* affirmed the decision of the United States District Court for the Eastern District of Pennsylvania granting defendant-respondent's motion for summary judgment.

OPINIONS BELOW.

The majority and dissenting opinions of the Court of Appeals, not yet reported, the order for and judgment on rehearing are appended hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania, reported at 286 F. Supp. 264 (1968), is also appended hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1970. This petition for a writ of certiorari is filed within ninety days of that date. The jurisdiction of this Honorable Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether it is a reasonable restraint of trade for a manufacturer of hair products which sells its products to distributors for resale (when the manufacturer parts with complete dominion over the products) to impose and enforce by termination of noncomplying distributors restrictions on the persons to whom the distributor may resell the articles purchased from the manufacturer.

2. Whether summary judgment is properly granted in an antitrust case in favor of a manufacturer which justifies its refusal to deal with a distributor upon the distributor's failure to adhere to the manufacturer's customer restrictions on the resale of its products when the record presents issues of fact with respect to the manufacturer's real motive in refusing to deal with the distributor, due to the evidence of illegal price fixing, and issues of fact as to the harmful effect of the products which the manufacturer asserts as its reason for the imposition of the customer restrictions.

STATUTORY PROVISION INVOLVED.

United States Code, Title 15:

Section 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE.

The plaintiff appellant below, the petitioner before Your Honorable Court, is a distributor of beauty and barber supplies. The defendant, respondent herein, is a manufacturer of approximately fifty various cosmetic products, principally those commonly applied to the hair and scalp; such as hair conditioners, setting lotions, hair dyes and toners, and permanent wave solutions. In the summer of 1967, after approximately thirty years during which respondent sold its products to petitioner, respondent advised petitioner that it would no longer sell product to it. Petitioner commenced this action in the United States District Court for the Eastern District of Pennsylvania, pursuant to the provisions of 15 U. S. C. Section 15, and requested recovery of threefold the damages sustained by it, reasonable attorney's fee and injunctive relief restraining respondent from refusing to sell to petitioner in violation of the antitrust laws.

Initially, respondent justified its termination of petitioner's distributorship on petitioner's slow payment and also because of petitioner's sale of product to the ultimate consumer contrary to respondent's instructions. Respondent shortly thereafter abandoned its contention that petitioners alleged poor credit was the reason for termination. The Court of Appeals considered that respondent's refusal to deal with petitioner was based solely upon petitioners sale of product contrary to the customer restrictions imposed by respondent. The Court of Appeals erroneously concluded that petitioner had abandoned its claim that termination was also based on petitioners sale of product at prices lower than respondent directed.

During the long business relationship between the parties petitioner always *purchased* product from respondent. At no time, and in no way, did respondent retain any

dominion over the products it sold to petitioner. Title, dominion and risk of loss passed to petitioner with respect to each article it purchased from respondent. Nevertheless, respondent sought to reserve and exercise control over the ultimate destination of the products which it sold to petitioner.

On the container of each article sold by respondent to petitioner and other distributors is a legend which restricts resale of the product to the professional beautician. Thus, a package may contain any one of the following legends: "This product is strictly for use by professional beauticians. Sale to or use by any other person is forbidden, and will void any warranty concerning the use of this product"; or "For Professional Use Only. Not For Resale Or Home Use"; or "For Professional Use Only. Not For Resale"; or "For Professional Use Only. Not For Resale To The Public"; or "For Use By Professional Beauticians Only. Sale To Any Other Person Is Prohibited". Contrary to these attempted restraints petitioner resold to the public certain of the products which it purchased from respondent.

Respondent seeks to justify its customer restrictions on resale by reason of the alleged harm which could be caused by the improper use of these products by the untrained consumer. Thus, several of respondent's officers testified on deposition that if the products were used improperly, and contrary to the extensive directions contained in each package, they could cause damage to the hair and scalp. At least two products, however, both hair conditioners, were conceded by respondent's vice president to be without danger. The affidavit of petitioner's chief operating officer, filed in opposition to respondent's motion for summary judgment, states that these two products are not dangerous in any manner whatsoever, but are like all

hair conditioners sold directly to the public by other manufacturers. As to these products, which are packaged in containers bearing a legend restricting resale to the professional beautician, respondent's vice president testified on deposition that the restriction on resale is "put on there out of loyalty to the hairdressers".

Respondent sells the bulk of its hair products to the professional trade through distributors like petitioner. Two hair conditioners are distributed by respondent to the ultimate consumer through drug wholesalers, chain drugstores and mass merchandisers.

Respondent's sales manager and treasurer testified on deposition that in the spring of 1967, respondent received calls from distributors, jobbers and hairdressers "too numerous" to name that petitioner was selling product to the retail trade notwithstanding the restriction imposed by respondent on such transactions. Respondent thereupon investigated these complaints and learned that petitioner was selling product to the consumer at discount prices. The affidavit filed by respondent's district sales manager in support of respondent's motion for summary judgment states that after respondent became aware that petitioner was selling product to the consumer it caused "shoppers" to visit petitioner's stores for the purpose of determining if sales would be made to them. Respondent's general sales manager by letter of June 21, 1967, admittedly mailed to petitioner, stated as follows:

> We have been advised that you are now operating retail stores in which Wella merchandise is being sold. You will note that our packages are marked "for professional use only" not to be resold. We note too that your prices are contrary to our advertised deals.
>
> I am sure you can appreciate the difficult position you place us in when this type of activity is permitted.

> We would like your cooperation in selling Wella merchandise only to professional registered hairdressers as well as your agreement to honor Wella policies in the distribution of merchandise bearing our name.

Respondent's president testified upon deposition that all distributors such as petitioner know they are not to sell in the retail field. Such sales are against respondent's policy and prohibited. Two months after respondent received complaints from other distributors and professional beauticians that petitioner was selling product directly to the consumer the respondent advised petitioner it would no longer sell product to it.

Based upon the pleadings, depositions and affidavits on file the District Court granted respondent's motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. The Court held that petitioner merely alleged and proved a unilateral refusal to deal, and that the claim of price fixing asserted in the complaint was totally defeated by the affidavits on file (A24, A27).

A majority of the Court of Appeals upon reargument before the Court *en banc*, after the original three judge panel ordered rehearing on its own motion following argument before the panel, in a 4 to 3 decision affirmed the District Court holding (1) that petitioner abandoned its contention that price maintenance motivated respondent's refusal to deal (A4, A13), (2) that the decision of this Honorable Court in *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), "does not . . . establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer" (A7), (3) that the customer restrictions imposed by respondent must be tested by the "standard of reasonableness" (A8) and (4) that respondent made a "convincing demonstra

tion" that these restraints are reasonable to protect the public from injury and respondent from product liability suits (A9). Consequently, a majority of the Court of Appeals concluded that respondent's motives in imposing the customer restrictions furnish a sufficiently lawful purpose for the restraint imposed.

The three dissenting judges held that the record does not permit the summary disposition of the case due to the presence of factual issues with respect to respondent's real motive for its refusal to deal with petitioner, and the need for broader development of the facts to determine if the case is to be judged by a *per se* rule or the standard of reasonableness (A15). If the rule of reason is applicable, then, according to the minority opinion, there remains a question of fact as to the actual extent of the danger from the use of respondent's products by the nonprofessional consumer. The dissent points out that respondent has not established the absence of a genuine issue of material fact as to the alleged danger in the use of its products and the real motive for the restrictions which is essential to the granting of summary judgment (A19).

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals Is in Direct Conflict With Applicable Decisions of This Honorable Court and Other Courts of Appeal as to the Unlawful Restraint of Trade Which Results When a Manufacturer Imposes Customer Restrictions on the Resale of Products Which the Manufacturer Sells to a Distributor.

In *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), this Honorable Court held that there is a violation of Section 1 of the Sherman Act, 15 U. S. C. Section 1, when a manufacturer *sells* products to a distributor subject to restrictions upon the persons to whom the distributor may resell the products. This conclusion was reached by Your Honorable Court in the absence of unlawful price fixing, and assuming nonpredatory motives and business purposes. The presence of price maintenance policies as alleged by petitioner in this case and evidenced by respondent's letter dated June 21, 1967, provides a basis for the establishment of a violation of the antitrust laws under universally accepted principles. See cases cited and discussion in *United States v. Arnold, Schwinn & Co.*, *supra*, at 375-76.

In *Schwinn*, this Honorable Court held that it is beyond the power of a manufacturer to impose customer restraints upon his vendee, and to do so results in a violation of Section 1 of the Sherman Act. There is a combination and conspiracy under the Sherman Act on the day one unwillingly complies with restrictive practices. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968); *Albrecht v. The Herald Co.*, 390 U. S. 145 (1968). Petitioner's failure to enter into any such unlawful com-

bitration cannot be grounds for respondent's refusal to deal.

The opinion of this Honorable Court in *United States v. Arnold, Schwinn & Co., supra*, at page 379, states:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. White Motor, supra; Dr. Miles, supra. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions or its resale.

Contrary to the decision of the Court of Appeals in the instant case, the decision of this Honorable Court in *United States v. Arnold, Schwinn & Co., supra*, has been properly interpreted and applied by the several courts of appeal which have had occasion to pass on the issue presented, as declaring unlawful the imposition of customer restraints by a manufacturer which has parted with dominion over the article sought to be restricted. *Intelephoto Corporation v. Minolta Corporation*, 417 F. 2d 621 (2nd Cir. 1969), *aff'g.* 295 F. Supp. 711 (S. D. N. Y. 1969); *Hensley Equipment Company v. Esco Corporation*, 383 F. 2d 252 (5th Cir. 1967) *mod.* 386 F. 2d 442 (5th Cir. 1967). A finding of enforced customer restrictions results in a *per se* violation of Section 1 of the Sherman Act, *Jewel Sales Corp. v. Lancia Parfums, Inc.*, 396 F. 2d 238 (2nd Cir. 1968) *cert. denied*, 393 U. S. 938 (1968). In addition, several district courts have properly recognized the holding in *Schwinn* as declaring to be unlawful any restrictions upon the persons to whom an article may be resold by a dis-

tributor which purchases the product from a manufacturer. *Ansul Company v. Uniroyal, Inc.*, 306 F. Supp. 541 (S. D. N. Y. 1969); *United States v. Glaxo Group, Limited*, 302 F. Supp. 1 (D. D. C. 1969); *Sherman v. Weber Dental Manufacturing Company*, 285 F. Supp. 114 (E. D. Pa. 1968).

The Court of Appeals in the instant case erroneously held that the *Schwinn* decision "[D]oes not . . . establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer." (A7). This is clearly contrary to the express holding in Schwinn and the application of *Schwinn* by the several courts of appeal and district courts which have considered the matter. The Court of Appeals in this proceeding erroneously assumes that the applicability of the rule enunciated in *Schwinn* is necessarily dependent upon the type of product involved and the nature of the restriction. No such distinction is made or advanced in *Schwinn* or its progeny, and no such distinction can have any meaningful impact on the anticompetitive effect of customer restrictions which is the issue presented for decision in this case. See *United States v. Glaxo Group Limited*, *supra*. The decision in *Schwinn* teaches that a manufacturer must distribute its products other than by *sales* to a wholesaler if it wishes to control the ultimate disposition of the product.

The decision of the Third Circuit conflicts with a decision of this Honorable Court on the identical question, and also with subsequent decisions of other courts of appeal and district courts. For this reason certiorari should be granted.

2. The Decision Below Conflicts With the Principles Governing the Granting of Motions for Summary Judgment Set Forth in the Federal Rules of Civil Procedure as Interpreted and Applied in Decisions of This Honorable Court as Well as Decisions of Other Courts of Appeal.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered if "the pleadings, depositions and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Upon motion for summary judgment the record must be viewed in the light most favorable to the party opposing the motion, it may be granted only if the truth is clearly demonstrated so that there does not remain any issues of fact for trial and if the moving party is entitled to judgment as a matter of law. *United States v. Diebold, Inc.*, 369 U. S. 654 (1962); *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620 (1940). This Honorable Court has cautioned against the use of summary procedures in antitrust cases where motive and intent play such leading roles. *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962).

In the instant case even if it is assumed that the Court of Appeals properly applied the rule of reason to respondent's admitted restraint, contrary to the decision in *United States v. Arnold, Schwinn & Co., supra*, the applicable principles governing the entry of a motion for summary judgment were not followed. The majority opinion of the Court of Appeals holds that respondent made a "convincing demonstration" that its customer restrictions are reasonable (A9). This is not sufficient as a matter of law to permit the entry of summary judgment. In *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134,

136, n. 4 (1968), this Honorable Court held that whether a restriction on the resale of goods is reasonable cannot be decided upon a motion for summary judgment, but must be resolved by a trial on the merits. As the three dissenting judges in the Court of Appeals amply demonstrate there remains for decision factual issues necessary to a proper resolution of this case.

Notwithstanding a contrary affidavit by petitioner's chief operating officer, and the testimony on deposition of respondent's vice-president that at least two of respondent's "professional" products are not harmful, the majority opinion of the Court of Appeals concludes that there remains no genuine issue of fact as to the alleged danger of respondent's "professional" products which would render the customer restrictions an unreasonable restraint of trade. Further, and notwithstanding respondent's letter of June 21, 1967, in which petitioner is requested to adhere to respondent's policies in the distribution and pricing of respondent's merchandise, the majority opinion of the Court of Appeals concludes that respondent's restrictions are, as a matter of law, unrelated to a scheme involving unlawful price fixing. The reason for respondent's refusal to deal with petitioner is a question of fact to be decided by a jury. *Bragen v. Hudson County News Company*, 321 F. 2d 864 (3rd Cir. 1963).

The granting of summary judgment in favor of respondent upon this record is contrary to the rules of procedure as interpreted by the decisions of this Honorable Court. It is necessary that certiorari be granted so that this conflict may be removed.

CONCLUSION.

The decision of the Third Circuit conflicts with the applicable decisions of this Honorable Court and those of the Second and Fifth Circuits as well as several district courts. Research fails to disclose an appellate court decision in conformity with the rule adopted by the Third Circuit.

The decision of the Court below must be reviewed by this Honorable Court in order to prevent further misinterpretation of the prior decisions of Your Honorable Court in this crucial area of restraint of trade and the administration of the antitrust laws.

Respectfully submitted,

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Of Counsel:
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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17435

TRIPOLI COMPANY, INC.,
Appellant

v.

WELLA CORPORATION

(D. C. Civil Action No. 44332)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge* and FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS and GIBBONS, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 26, 1968, be, and the same is hereby affirmed, with costs taxed in favor of appellee.

ATTEST:
THOMAS F. QUINN
Clerk.

April 27, 1970

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17435

TRIPOLI COMPANY, INC.,
Appellant,
v.
WELLA CORPORATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 25, 1969
Before SEITZ, ALDISERT and STAHL, *Circuit Judges*

Reargued March 5, 1970
Before HASTIE, *Chief Judge*, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS and GIBBONS, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 27, 1970)

GIBBONS, *Circuit Judge*.

In this case the district court granted a motion of the defendant-appellee, Wella Corporation, (Wella), for summary judgment under Rule 56(b), FED. R. CIV. P., and plaintiff-appellant, Tripoli Company, Inc., (Tripoli), appeals.

Tripoli is a wholesale distributor of beauty and barber supplies to professional beauticians and barbers. Wella is the manufacturer of a line of cosmetics, some fifty in number, including hair dyes and tints, permanent waves, hair conditioners, setting lotions, and many similar products. Tripoli was for over thirty years, until the summer of 1967, a wholesale distributor for Wella. About that time Wella learned that Tripoli was engaged not only in wholesale distribution to the trade, but also, under the trade style "The Beauty Cage" in retail sales to consumers. Wella then stopped selling to Tripoli, and this lawsuit followed.

Tripoli's complaint sought an injunction "to require (Wella) to resume sales to plaintiff under standard commercial terms" as well as damages suffered "by reason of the violation by (Wella) of the Clayton and Robinson-Patman Acts." The complaint makes no reference to the Sherman Antitrust Act, 15 U. S. C. §§ 1-7 (1964), and the only factual allegation, aside from conclusory statements respecting public injury, and private damage to Tripoli's business and property, is the seventh paragraph:

> After approximately thirty years of the above described business relationship, defendant has refused to sell its products to plaintiff on the ground that plaintiff has from time to time *charged its customers a price lower than that which defendant recommended as the resale price in the relevant market area.* (italics added).

That allegation has no relationship to the Clayton Act, 15 U. S. C. §§ 12-27 (1964), or the Robinson-Patman Act, 15 U. S. C. §§ 13 and 13a (1964). Possibly it may be sufficient to charge a violation of Section 1 of the Sherman Antitrust Act, even absent any allegation of conspiracy or concert of action, since, by a generous construction one could read the quoted allegation as a charge of maintaining resale prices at the wholesale level without the benefit of a valid fair

trade agreement. Compare *United States v. Colgate & Co.*, 250 U. S. 300 (1919) with *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960).

The continued vitality of the *Colgate* doctrine, permitting unilateral termination for failure to adhere to suggested resale prices, need not, however, be considered, for Wella categorically denied that resale price maintenance had anything to do with the termination, and Tripoli effectively abandoned that contention.

Wella's answer asserted that the true reason for termination was not resale price maintenance, but rather, the resale to retail customers of Wella products intended for the professional trade. Wella went further; it denied that it recommended resale prices to Tripoli, and alleged that Tripoli was free to sell Wella products at any price it chose.

After Wella's answer was filed, Tripoli pursued extensive discovery. It deposed Thomas, the Wella sales manager responsible for Tripoli's territory; Bishop, Wella's general sales manager; Rosendahl, Wella's vice president in charge of sales; Haas, Wella's treasurer; Furia, Wella's credit manager, and Megerle, Wella's president. Only two of these deponents, Bishop and Haas, were asked any questions about resale prices. Both testified that Tripoli's resale prices were of no interest to them, and the matter was not pursued further. Instead, all the Wella witnesses were examined at length about the reason for termination asserted in its answer; that is, resale to non-professional retail customers. Although Wella sold to wholesale competitors of Tripoli, no depositions were taken of third parties.

We review the history of the discovery proceedings because they make it clear that the resale price maintenance contention was abandoned. Unlike horizontal price-fixing

1. Pennsylvania Fair Trade Act, PA. STAT. ANN. Tit. 73, §§ 7-11 (1960).

arrangements, which are almost certain to be closely guarded secrets, a resale price maintenance program must of necessity have been communicated to Tripoli and to other wholesalers. Thus, we are not dealing with a situation where the proofs necessary to sustain a cause of action are locked in the bosom of the alleged conspirators. No hostile witnesses thicken the plot, for if there was a resale price maintenance program for Wella's fifty products, who better than Tripoli would have that information after thirty years as a distributor. Compare *Poller v. Columbia Broadcasting*, 368 U. S. 464, 473 (1962). Moreover, Tripoli did not move for a postponement of the motion for summary judgment pending further discovery.

Charles Di Puppo, an executive of Tripoli, was also deposed. He was asked to identify certain correspondence, dealing mainly with credit. He declined to do so. Significantly, he denied receipt of an exhibit, addressed to him, D-7, marked for identification in his deposition, which is the only item in the entire record, except for the complaint, which contains any reference to resale prices. This reference is ambiguous, for the letter speaks of "our advertised deals," and its meaning is not explained. The addressee denied receipt of the letter. Whether or not it was received, however, Tripoli certainly had in its own possession sufficient information to come forward with an explanation relating the reference to a resale price maintenance program if such was intended. Except for Mr. Di Puppo's denial of receipt, no reference is made to the exhibit, however, in any deposition or affidavits. Whatever its meaning, it cannot on the record before us be given any evidentiary weight.

In support of its motion for summary judgment, Wella filed affidavits denying that resale pricing was the reason for termination, and asserting that termination was prompted by Tripoli's failure to comply with terms of credit

and by its violation of resale restrictions imposed on Wella's products. Tripoli chose to fight on these grounds. The two affidavits which it filed in opposition to the motion for summary judgment deal with credit [2] and with resale to non-professional customers. There is no contradiction whatsoever, either in those affidavits or in Mr. Di Puppo's deposition, of Wella's affidavits denying the resale price maintenance allegation.

In these circumstances, summary judgment on the resale price maintenance charge was clearly appropriate. Rule 56(e), FED. R. CIV. P., as amended in 1963, has laid to rest the rule of *Frederick Hart & Co. v. Recordigraph Corp.*, 169 F. 2d 580 (3 Cir. 1948), formerly applicable in this circuit, under which Tripoli's unverified complaint might have been sufficient to raise a fact issue sufficient to defeat summary judgment. Even in an antitrust case a party must now come forward with affidavits setting forth specific facts showing that there is a genuine issue for trial.

What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion against him.

* * *

To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving

2. It is not contended that termination for credit reasons would have any antitrust significance.

litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. *First Nat'l. Bank v. Cities Service Co.*, 391 U. S. 253, 289-90 (1968).

But while it abandoned the price maintenance charge, Tripoli did not abandon the fray. Instead, it adopted Wella's theory of the reason for cancellation. Relying on *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), Tripoli contended that Wella's policy of restricting resale of its professional beauty care products to professional beauticians and barbers, after title to those products passed to a wholesaler, is a per se violation of the Sherman Antitrust Act, 15 U. S. C. § 1 (1964). No motion was made to amend the complaint, but the district court did, and we do, consider the merits of that contention in the light of the pleadings, depositions on file, and affidavits. FED. R. CIV. P. 56(c).

It is clear that not all restraints in a system of distribution fall into the per se category. *United States v. Arnold, Schwinn & Co., supra. White Motor Co. v. United States*, 372 U. S. 253 (1963). Those condemned in *Schwinn* as per se violations were post-sale restrictions on the territory in which or the retailers to whom a wholesaler could resell. That case does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn* must be read, as must all antitrust cases, in its factual context. That context is a restraint on the territories in which and retailers to whom a wholesale

purchaser may resell a bicycle, a product so simple in use that most ultimate consumers are children. No considerations other than marketing and competition were advanced in *Schwinn* as justifications for the restraint. In that context the Supreme Court held:

> Under the Sherman Act, it is unreasonable *without more* for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.

United States v. Arnold, Schwinn & Co., *supra*, at 379 (italics added).

Here there is more, and the restraints are of a different order. Tripoli does not charge that it or any other Wella distributor is confined, in reselling, to a specific territory. Nor does Tripoli charge that it or any other Wella distributor is confined to reselling to "franchised" beauty or barber shops. The restraint is on a wholesale distributor's reselling products intended for professional application to non-professional retail end users. This restraint must be tested not by a *per se* rule but by the standard of reasonableness. *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918); *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *Addyston Pipe & Steel Co. v. United States*, 85 F. 271, 282 (6 Cir. 1898), *aff'd*, 175 U. S. 211 (1899).[3] By

3. We are aware that in *United States v. Glaxo Group Ltd.*, 302 F. Supp. 1 (D. D.C. 1969), a district court read *Schwinn* as imposing a *per se* rule with respect to every post-sale restraint on alienation regardless of market context or purpose. We are not convinced, however, that the Supreme Court intended, for example, that an automobile manufacturer using wholesale intermediate sellers must permit distribution of automobiles through beauty parlors or barber shops rather than through dealers offering appropriate pre-sale and post-sale service. Other examples can be imagined. We do not believe that in the age of "consumerism" the Supreme Court intended

that standard Wella made a convincing demonstration on its motion for summary judgment that in view of the nature of its products, the restraint in the market setting was not only reasonable but appropriate in the public interest. Tripoli, in response, came forward with nothing significant.

We consider first the nature of the products. Of some fifty, all but two are packaged in a manner intended for resale to the professional trade. The two products intended for sale to retail customers are hair conditioners, which have the effect of softening hair to make it more manageable. These are sold, through separate channels of distribution, to drug and grocery retailers. Wella's president testified on deposition (and that testimony is uncontradicted) that the chemical formulation of the two hair conditioners sold to retail channels is different from that sold to the professional trade; that the suggested method of application is different; and that the two products are not used for the same purpose. It is also undisputed that the hair conditioners intended for professional use are marketed in boxes containing a supply of smaller units for individual application, with the appropriate instructions and warnings furnished with the box; while the hair conditioners intended for retail sale are individually packaged and labeled, with appropriate instructions and warnings furnished with each application.

Except for the two hair conditioners sold through retail channels of distribution, all other Wella products are sold through wholesalers who resell to the professional

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3. (cont'd)

so drastic a reduction of the areas in which a manufacturer may exercise responsibility to the consumer as is suggested in *Glaxo*. The restraint in *Glaxo*, moreover, operates in quite a different market context, since the patents there involved provide protection from inter-brand competition and the addition of the restraint had the added effect of limiting intra-brand competition. Neither situation is present in the instant case.

beauty and barber trade, and each of those products is packaged with a label:

> For sale to professionals only; sale to any other person is prohibited.

In addition, many of the products are sold with a label containing a warning:

> CAUTION: This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test, according to accompanying directions, should first be made. This product must not be used for dyeing the eyelashes or eyebrows—to do so may cause blindness.

The latter label is required on many of Wella's products by Section 601(a) of the Federal Food, Drug & Cosmetic Act of 1938. 21 U. S. C. 361(a) (1964).

Some Wella products are sold with an instruction sheet containing an instruction:

> HYPERSENSITIVITY AND THE PATCH TEST
>
> It is a well-known fact that some individuals are allergic to certain foods, drugs or cosmetics including hair coloring. Such persons are considered supersensitive or predisposed. To ascertain whether a person is predisposed to COLOR CHARM, the following standard patch test must be made before each application of COLOR CHARM:

Such an instruction is required for many Wella products by the Color Additive Regulations issued by the Federal Food and Drug Administration. 21 C. F. R. § 8.1(u) (1969).

It is undisputed that misuse of many of Wella's products can cause dangerous adverse effects such as blind-

ness, burning or irritation of the scalp or brittleness of the hair. Mr. Di Puppo in his deposition freely acknowledged as much. He also admitted making retail sales to non-professionals, but contended that he did this selectively, by asking the customer how much she knew about use of the product. In his words:

> This is just a policy that I have. In other words, if Mary Jones doesn't know how to use the Wella hair color, which by the way, has directions in it how to use it, but if they don't know how to use it, we won't sell it to them.

Because Mr. Di Puppo took it upon himself to make this judgment, Tripoli lost the Wella line, for Wella insists that resale be made only to licensed professional beauticians and barbers.

Pennsylvania has established a system of licensing for beauticians and for barbers. To obtain a license as a beautician one must pass an examination. PA. STAT. ANN. Tit. 63, § 509 (1968). Admission to the examination requires a tenth grade education and the completion of twelve hundred fifty hours of schooling in a registered beauty culture school or a three year apprenticeship. PA. STAT. ANN. Tit. 63, § 510 (1968). Licensing requirements for barbers are similar. PA. STAT. ANN. Tit. 63, §§ 552, 553. Even more stringent licensing regulations are imposed on the beauty culture trade by the Health Code of the City of Philadelphia. See *Department of Licensing and Inspections v. Weber*, 394 Pa. 466, 147 A. 2d 326 (1959). Wella has imposed on its wholesale distributors a requirement that their sales of its professional products line be restricted to persons in the licensed category. It states that its motive is the same as that of the licensing authorities, the protection of the public against injury.

It may well be that Wella is not as much interested in protecting the public from harm as in protecting itself from potential product liability. See, e.g., *Helene Curtis Industries, Inc. v. Pruitt*, 385 F. 2d 841 (5 Cir.) *cert. denied*, 391 U. S. 913 (1968); *Newmark v. Gimbel's Incorporated*, 54 N. J. 585 (1969). But whichever motive is dominant, either furnishes a sufficient lawful main purpose, to which the restriction on resale of potentially dangerous products is reasonably ancillary. Even tie-in agreements designed to protect against warranty claims have been held valid. E.g., *Susser v. Carvel Corp.*, 332 F. 2d 505, 517 (2 Cir.) *cert. granted*, 379 U. S. 885 (1964), *petition for cert. dismissed*, 381 U. S. 125 (1965); *Pick Mfg. Corp. v. General Motors Corp.*, 80 F. 2d 641 (7 Cir. 1935), *aff'd.*, 299 U. S. 3 (1936). Resale restrictions imposed for the same purpose have also been sustained. *Denison Mattress Factory v. Spring-Air Co.*, 308 F. 2d 403 (5 Cir. 1962).

In an attempt to show that Wella was itself introducing professional products into non-professional consumer hands, Tripoli examined Wella's officers about the two hair conditioners sold through retail outlets. The attempt failed, for the only witness who professed to have any knowledge about formulations, Megerle, testified that the professional and non-professional products, even when bearing the same name, were different formulations; that one was a cream and the other a liquid; that they were not used for the same purpose; and that they were applied differently.

Had product identity between the two retail products and two of the fifty professional products been established, however, Tripoli's case would not have been advanced. Certainly the inclusion of these two, in different packages and quantities, with different forms of instruction for use, would not make the resale restriction on the entire profes-

sional line unreasonable. Even treating the two hair conditioners separately, the difference in packaging and quantity, and the difference in the manner of calling to the user's attention appropriate instructions for use, would seem ample justification for the resale restriction as to them.

There is no allegation here of any attempt to shelter Wella's products from intra-brand competition among wholesalers calling on the same trade, nor has there been any showing that Wella's products have, by the restraint imposed, been sheltered from competition with other brands. On the contrary, the record discloses that Wella's distributors to the professional trade compete in the same territory, and that Tripoli itself has always handled competing brands. It is difficult to imagine, therefore, a circumstance in which the restriction on resale to the professional trade could have a meaningful anti-competitive effect. None is suggested in the record.

Moreover, while the point was not made to the lower court, there is a serious question whether Wella could legally permit its wholesaler, Tripoli, to engage in a retail business with the subsidy afforded by a price structure intended to support a sales effort to the professional trade. See *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U. S. 341 (1968); Robinson-Patman Act, 15 U. S. C. §§ 13 and 13a (1964). Such an arrangement might well run afoul of the Federal Trade Commission Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry, 16 C. F. R. § 221.1(f) (1970). This would be especially true with respect to the two hair conditioning products sold through retail channels of distribution if, as Tripoli contends on appeal (but did not attempt to show below), these are identical with two professional products.

Summarizing, Tripoli first charged a termination for resale price maintenance, but abandoned that contention

and relied on the licensed user restraint as a per se violation. It did nothing to rebut Wella's showing that the licensed user restraint was reasonably ancillary to Wella's lawful purpose of protecting the public from injury and itself from liability. Rule 56(e), FED. R. CIV. P., requires more. *First Nat'l. Bank v. Cities Service Co.*, 391 U. S. 253 (1968); *Lockhart v. Hoenstine*, 411 F. 2d 455, 459 (3 Cir. 1969).

The judgment of the district court will be affirmed.

FREEDMAN, *Circuit Judge*, dissenting.

This antitrust case is being decided without trial, on depositions and affidavits. The Supreme Court has warned us in Poller v. Columbia Broadcasting, Inc., 368 U. S. 464, 473 (1962), that in such cases, where subjective elements of motive and intention have a special relevance, summary judgment should be sparingly employed. One of the reasons for this is that affidavits signed by the litigants or their officials are drawn by their lawyers,[1] and it is only under the pressure of the trial itself, where a party has the opportunity to cross-examine, that disclosure of these subjective elements can be fully achieved. Depositions, while they meet some of the objections to affidavits, are no substitute for the searching pressure of a trial in the presence of the finder of fact who observes demeanor and evaluates credibility.

It is true, of course, that *Poller* did not create a principle of law excluding antitrust cases from the operation of Rule 56 authorizing summary judgment. It does, how-

1. Thus, the affidavits of defendant's employees, Palladino, Silvestro, Paraine and Hayman, all were carefully drawn in virtually identical language.

ever, teach us to be on guard against ignoring the outcroppings of a genuine issue of fact in the record, despite professions in affidavits or even depositions of lawful business motive and justification.

It is also true that we are not dealing here with a giant like the corporation involved in *Poller*. But the lure of price fixing and of customer selection may be relatively as significant to a small company as it is to a corporate giant, and motives of self-interest may make the search for proof just as difficult.

In this case, although the complaint was inadequately drawn[2] and the pretrial proceedings were rather loosely conducted, I believe enough already appears to make summary judgment unjustified for two reasons. (1) There exists a genuine issue of fact on whether defendant terminated the relationship of the parties because plaintiff refused to observe defendant's price fixing policy. (2) The determination whether defendant's admitted restriction of the resale of its products to professional beauticians was either unlawful per se under the rule in United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967), or unreasonable under the test of the "rule of reason" of Standard Oil Co. v. United States, 221 U. S. 1 (1911), cannot adequately be made without further factual information.

I.

It is undenied that defendant's general sales manager wrote a letter to the plaintiff on June 21, 1967, which speaks both of price and restrictive policy on resales. This letter was tendered by the defendant itself on depositions in order

2. I agree, as the majority in effect holds, that we should treat the case as if the complaint had been amended to conform to the substance of the claim as it now appears. This general principle is especially applicable in view of the public interest in the enforcement of the antitrust laws by private suitors.

to contradict plaintiff's claim that plaintiff had received no warning before defendant terminated their relationship. Although plaintiff denied receipt of the letter, this is of no real significance, for the immediate question is not the effect on the plaintiff but rather the conduct of the defendant, and this is its own statement describing its conduct and its purpose. I believe the letter alone is sufficient to forbid the entry of summary judgment for the defendant. It reads as follows:

> "We have been advised that you are now operating retail stores in which Wella merchandise is being sold. You will note our packages are marked 'for professional use only' not to be sold retail. We note too that your prices are contrary to our advertised deals.
>
> "I am sure you can appreciate the difficult position you place us in when this type of activity is permitted.
>
> "We would like your cooperation in selling Wella merchandise only to professional registered hairdressers as well as your agreement to honor Wella policies in the distribution of merchandise bearing our name."

It is, of course, not clear beyond doubt what is meant by "advertised deals," but defendant, who seeks summary judgment, has supplied no explanation on the record. On its face, it is enough to establish that defendant complained that the prices plaintiff was charging were contrary to something which the defendant established. This brings the case into the forbidden area of price fixing. Indeed, it seeks the plaintiff's cooperation and agreement to honor the defendant's policies. It is true that this letter seems a stray piece of evidence, but it is not to be expected that intentions of price fixing are to be extensively recorded in documents coming from a defendant in an antitrust case. It is enough

that there is even a hint of price fixing, which would create liability per se,[3] to require the case to be tried. Such an issue should not be lost in a summary judgment.

II.

The defendant claims that it terminated its relationship with plaintiff not because of a failure to maintain prices, but rather because of refusal to conform to the restriction of the resale of defendant's products to professional beauticians. This restriction is claimed to be justified by the danger of physical harm to non-professional users. In my view, the record is too incomplete and inadequate to eliminate for consideration on a trial the question whether this restriction violates the antitrust law.

It is not enough to say that there is some danger in the use of hairdressings and similar items made by the defendant or to cite damage recoveries against a cosmetic manufacturer.[4] It is by now a truism that individual susceptibilities at times produce injury because of allergic or other reactions to products or materials generally used without ill effect. It is common knowledge that even familiar household drugs in wide use, such as aspirin, can in some cases produce harmful side effects. It would be astonishing if this well known fact would justify a producer's restriction of the ultimate marketing of his products to physicians and druggists.

Here, several of the products of the defendant admittedly present no great danger if used in accordance with

3. United States v. Parke, Davis & Co., 362 U. S. 29, 43-44 (1960); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 (1911).

4. Helene Curtis Industries, Inc. v. Pruitt, 385 F. 2d 841 (5 Cir., 1967), cert. denied 391 U. S. 913 (1968), cited by defendant, in fact held that the manufacturer of a product which contained a label restricting resale to professional users was not liable to a user who had purchased it.

instructions. Others present no real danger if the patch test which the defendant suggests is employed. Yet defendant applies to these products its restriction against resale to non-professionals. Indeed, there is even some acknowledgment by the defendant that it prohibits the resale of certain non-dangerous products "out of loyalty to the hairdressers" because its main business is the production of items for the professional beautician.

Moreover, the letter of June 21, 1967, which dealt with both prices and non-professional sales, was admittedly written by the defendant not out of its concern for the safety of the ultimate consumer, but rather as a result of complaints by other distributors and beauticians that plaintiff was selling the products to retailers. It is these complaints which the defendant investigated, and as a result of which it wrote the letter.

The requirement by a producer or manufacturer that the purchaser of his product may not resell it to certain classes of purchasers is by now recognized as a serious restriction on freedom of trade and competition which the antitrust laws are meant to preserve.[5] In some cases such a restriction is deemed illegal per se,[6] and in others the rule of reason applies,[7] requiring a knowledge of all the surrounding circumstances which reveal the practical effect and meaning of the restriction. Even if defendant's claim that it imposed the restriction on resale out of concern for the safety of the consumer were enough to take it out of the per se rule of *Schwinn*, the self-serving statements by lay businessmen of self-evident possibilities of harm are inadequate to prevent a trial of the issue under the rule of

5. White Motor Co. v. United States, 372 U. S. 253 (1963).

6. United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967).

7. Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F. 2d 398 (2 Cir.), cert. denied 393 U. S. 938 (1968).

reason. We have before us no scientific or other expert testimony describing the nature or extent of the danger to laymen from the use of any of defendant's products, nor of any experience in the use of similar products containing adequate notice or warning. Information of this kind goes to the heart of plaintiff's case. For plaintiff has not claimed that there may be no danger whatever from the use of some of the defendant's products. Its claim instead is that whatever danger there is constitutes a risk which can reasonably be guarded against by labeling or even by individual cautionary advice. The effectiveness of this depends to a large extent, of course, on the nature of the risk and of the means which must be taken to guard against its potential harm.

Summary judgment, of course, is to be granted only after all doubts as to the existence of a genuine issue of a material fact are resolved against the moving party.[8] However meager may be the plaintiff's case, it has called forth from the defendant a defense which, if not subject to a per se rule, must at least fit the requirement of the rule of reason. I fail to see how such a determination can be made at this stage of the case. To me the words of the Supreme Court in White Motor Company v. United States, 372 U. S. 253, 263-64 (1963) are applicable here:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they

8. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495, 500 (1969); Poller v. Columbia Broadcasting, Inc., 368 U. S. 464, 473 (1962). Also, Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari A. S., — F. 2d — (3 Cir. 1970); Toebelman v. Missouri-Kansas Pipe Line Co., 130 F. 2d 1016, 1018 (3 Cir. 1942).

> have such a 'pernicious effect on competition and lack . . . 'any redeeming virtue' . . . and therefore should be classified as per se violations of the Sherman Act. . . . We conclude that the summary judgment . . . was improperly employed in this suit. . . . We do not intimate any view on the merits. We hold only that the legality of the . . . limitations should be determined only after a trial."

I would reverse the entry of summary judgment for the defendant and remand the case for trial.

Circuit Judge Seitz and Circuit Judge Adams join in this dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 17435.

TRIPOLI COMPANY, INC.,

Appellant,

v.

WELLA CORPORATION.

Present: HASTIE, *Chief Judge*, and KALODNER, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges*.

ORDER.

Pursuant to a vote of a majority of the Circuit Judges of this Court in active commission,

It is ORDERED that the above-entitled case be reheard by the Court en banc; and

It is Further ORDERED that this appeal be restored to the calendar for reargument before the Court en banc, at a date to be set by the Clerk at the convenience of the Court.

By THE COURT,

DAVID STAHL,
Circuit Judge.

Dated: September 30, 1969.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 44332.

TRIPOLI COMPANY, INC.

v.

WELLA CORPORATION,
524 Grand Avenue,
Englewood, New Jersey.

OPINION.

WEINER, *J.*, June 26, 1968.

Defendant manufacturer has moved for summary judgment, pursuant to Fed. R. Civ. P. 56(b), against plaintiff distributor, in this private, treble-damage antitrust action. In its original suit, plaintiff complains that after approximately thirty years of distributing defendant's beauty supplies to retailers and consumers, plaintiff has now been refused defendant's trade. In its complaint, plaintiff alleges that defendant has so acted on the ground that plaintiff has from time to time charged its customers a price lower than that which defendant recommended for resale.

In its answer to the complaint, defendant denies as "utterly false and untrue" the allegation that resale price maintenance figured among its motives in discontinuing plaintiff as one of its distributors. Rather, defendant counters, its reasons for ceasing to sell to plaintiff were based solely on the latter's unwillingness to follow defendant's instructions that certain of its products were to be sold in accordance with the instructions marked thereon.

viz.: "for professional use only, not to be resold [to the non-expert public at large].

At this stage of the pleadings, defendant made its motion for summary judgment. Thereafter both plaintiff and defendant submitted opposing affidavits, as specifically required by amended Rule 56(e). Issue is therefore joined for the purposes of this motion.

Discussion of plaintiff-respondent's contentions in its complaint must be divided into two parts. We deal first with any cause of action which might be made out under the antitrust laws. We shall then focus upon the specific case made out by the respective parties on this motion by defendant-petitioner for summary judgment in its favor.

In its complaint, and again in its brief opposing the instant motion, respondent speaks of violations of simply "the Clayton and Robinson-Patman Acts." Respondent appears to seek the protection, more exactly, of the Clayton Anti-Trust Act §§ 1, 2 (as amended by the Robinson-Patman Act § 1), and 4, 15 U. S. C. §§ 12, 13, and 15.

Although respondent uses the language of the cases under Sherman Act § 1 (as amended by the Miller-Tydings Fair Trade Act), now 15 U. S. C. § 1,[1] by alleging a refusal to deal on the part of petitioner allegedly because of respondent's lack of cooperation toward resale price maintenance, Sherman Act § 1 avails respondent nothing; because

1. The Sherman Act § 1 reads, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity [under a trademark or brand name] . . . when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State . . . in which such resale is to be made . . . ." Pennsylvania, the relevant state in this action, has a fair-trade act, *see* 73 P. S. § 7 *et seq.* *See also Olin Mathieson Chem. Corp. v. White Cross Stores*, 414 Pa. 95 (1964); *Olin Mathieson Chem. Corp. v. Cohen*, 234 F. Supp. 80 (E. D. Pa. 1964).

no "contract, combination . . . or conspiracy" has been either pleaded or proved. Contrast *Albrecht v. Herald Co.*, 390 U. S. 145 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967); *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960); *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208 (1921); *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911).

Clayton Act § 2, 15 U. S. C. § 13, prohibits price discrimination. Unlike Sherman Act § 1, it does not require a "contract, combination . . . or conspiracy, in restraint of trade," but makes it unlawful, rather,

> for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . .

From the portion of Clayton Act § 2 here quoted, it will readily be seen that the discrimination decried presupposes unequal treatment between two otherwise equally situated customers, and that the section does not envisage the type of situation of which respondent complains in its treble-damage action.

In short, even if its pleadings were taken on their face, and even if petitioner had, as alleged, refused to deal unilaterally with respondent because the latter declined to maintain a resale price to petitioner's liking, without the added circumstance of a conspiracy of which petitioner were a part, or of a price discrimination practiced upon respondent to another's advantage, respondent has made out no cause of action cognizable under the federal antitrust laws. On this motion, however, there is an even more compelling

reason why summary judgment must be granted petitioner.

As has often been pointed out, Rule 56(e) was amended in 1963 for the specific purpose of overcoming "some judicial authority, notably in the Third Circuit, . . . that affidavits could not cut through well-pleaded allegations." 6 J. Moore, Federal Practice ¶ 56.11[3], at 2162 (2d ed. 1966). The Third Circuit itself has recognized this, and has declared itself in accord with the amendment both in letter and in spirit. In this vein, Judge Freedman, quoting the Advisory Committee on Rules, wrote as follows:

> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The [former] Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. . . ."
>
> . . . .

This amendment must be made fully effective. *Robin Constr. Co. v. United States*, 345 F. 2d 610, 615 (3d Cir. 1965). With this admonition in mind, we turn now to the pleadings and affidavits in the instant case.

Although, as mentioned above, respondent in its complaint charges that petitioner has refused to deal with it because respondent has occasionally charged its customers a price lower than that which petitioner recommended for resale, in respondent's affidavits submitted to show that "genuine issue as to any material fact" exists, for the purposes of Rule 56(e), the secretary of respondent corporation averred merely that petitioner would no longer sell to respondent products which it considered dangerous to the uninitiated consumers to whom respondent was reselling them.

Petitioner's affidavits, on the other hand, include a specific averment by the district sales manager for petitioner corporation that respondent's contention that petitioner attempted resale price maintenance "is factually and wholly incorrect." In such a posture, the pleadings and averments taken together appear to us to leave no "genuine issue as to any material fact" unresolved.

This is so, even keeping in mind the cautionary note expressed by the Supreme Court in *Poller v. Columbia Broadcasting*, 368 U. S. 464, 473 (1962), that the court

> must look at the record on summary judgment in the light most favorable to . . . the party opposing the motion . . . . We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Leaving aside the inapplicability to the rather doric[2] case before us of some of the dramatic characteristics of the above description, we think that in a quite recent discussion of *Poller* the Supreme Court has just laid down a standard for criteria to be applied to motions for summary judgment most appropriate to the instant petition:

> [T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

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2. Cf. *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867, 870 (2d Cir. 1962), quoting *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F. 2d 787, 790 (2d Cir. 1960).

First Nat'l Bank v. Cities Service, 36 U. S. L. W. 4394, 4404 (U. S., May 20, 1968).

In summary, respondent's complaint makes out no claim upon which relief may be granted under the federal antitrust laws. It is only a *concerted* refusal to deal with a motive of fixing prices that makes out a *per se* antitrust violation, *e.g.*, *United States v. General Motors Corp.*, *supra*; *Quinn v. Mobil Oil Co.*, 375 F. 2d 273, 274-75 (1st Cir.), *cert. dismissed*, 389 U. S. 801 (1967). Even a commentator such as Assistant Attorney General Donald F. Turner, who favors extending the reach of the antitrust acts so as to include "the inducement of and participation in a series of tacit vertical price-fixing agreements," still recongizes the need for something more than isolated acts for conduct to run afoul of the antitrust laws by amounting to an offending "*program* of resale price maintenance effected by refusals to deal." D. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 689, 691 (1962) (emphasis supplied).

As for Clayton Act § 2, 15 U. S. C. § 13, prohibiting price discrimination, it bears no relevance to resale price maintenance, *Quinn*, *supra* at 274 n. 4; *Davidson v. Kansas City Star Co.*, 202 F. Supp. 613, 618 (W. D. Mo. 1962); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 F. 566 (S. D. N. Y.) (Hough, J.), *aff'd*, 227 F. 46 (2d. Cir. 1915). Hence, on its pleadings, respondent has made no valid claim of any antitrust violation.

Even had respondent's allegations in its complaint made out a good claim, however, taken together with the affidavits of both parties to this motion, the resultant case for respondent is not sufficient to withstand this motion for summary judgment. The net claim respondent is heard to urge on this Rule 56 motion is that petitioner simply dis-

continued respondent as a distributor after many years of a hitherto mutually satisfactory commercial arrangement. For this there is no remedy under the antitrust laws,[3] *cf. Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 358 U. S. 822, *rehearing denied*, 358 U. S. 900 (1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd*, 239 F. 2d 176 (4th Cir. 1956) (per curiam); *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, C. A. No. 42985 (E. D. Pa., Apr. 2, 1968).

ORDER.

For the foregoing reasons, defendant-petitioner's motion for summary judgment, pursuant to Federal Rules of Civil Procedure 56(b), is hereby GRANTED.

IT IS SO ORDERED.

CHARLES R. WEINER, *J.*

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3. E. Timberlake, Federal Treble Damage Antitrust Actions § 14.07 (1965), entitled "Individual refusals to deal," contains the following general proposition: "There can be no doubt that an independent refusal to deal may be unlawful," (citing cases). In whatever other circumstances this statement may hold true, the authority upon which it purports to be based affords no illustrative support, *see Best Advertising Corp. v. Illinois Bell Tel. Co.*, 229 F. Supp. 275 (S. D. Ill. 1964), *aff'd*, 339 F. 2d 1009 (7th Cir. 1965) (complaint alleging refusal to deal with plaintiff's yellow-page advertising dismissed for failure to allege any antitrust violation); *Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co.*, 220 F. Supp. 784 (S. D. N. Y. 1963) (complaint by ousted distributor for preliminary injunction restraining replacement from soliciting plaintiff's customers dismissed for failure to state facts constituting violations of either Sherman Act §§ 1 or 2 or Robinson-Patman Act); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867 (2d Cir. 1962) (appellant's unilateral refusal to deal with fabric-store customers instituting treble-damage actions against it reluctantly upheld, and order below granting preliminary injunction against it reversed, *inter alia*, because the lack of "any concerned refusal to deal" made the claim fatally defective under Sherman Act § 1, which "requires some type of joint action . . . ." *Id.* at 870).

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 446.

TRIPOLI COMPANY, INC.,

Petitioner,

v.

WELLA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent respectfully prays that the Supreme Court deny a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above matter on April 27, 1970.

OPINIONS BELOW.

The opinion of the District Court is reported at 286 F. Supp. 264 (1968), and is printed in the Appendix to the petition at page A22 thereof. The opinion of the Court of Appeals is unreported as yet and is printed in the Appendix to the petition at page A2 thereof.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1970. The jurisdiction of this Court was invoked by petitioner under 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED.

1. Does the refusal of a manufacturer of hair preparations to sell a wholesaler who deliberately resells products to the general public intended for safety reasons to be used by licensed personnel only violate the Antitrust statutes?

2. Did the District Court err in granting summary judgment to defendant manufacturer which ceased selling to distributor who, on deposition, admitted selling inherently dangerous commodities to general public in violation of Federal Food & Drug Administration Act?

STATUTORY PROVISIONS INVOLVED.

1. Petitioner belatedly relies on the Sherman Antitrust Act, 15 U.S.C. 1 (1964). Respondent denies its applicability.

2. Federal Rule of Civil Procedure 56(b) reading:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

COUNTERSTATEMENT OF THE CASE.

The respondent is the manufacturer of fifty-two hair and cosmetic products, of which all but two are sold to wholesale distributors for resale to professional beauticians only. On the containers in bold print is a legend prohibiting the sale of the fifty products to other than professional beauticians, in accordance with the requirements of the Federal Food and Drug Act. The packaging made it abundantly clear that the dealer was not allowed to sell these products to anybody excepting a licensed professional beautician.

The other two products, not chemically dangerous, are sold in different containers and different colored packages to drug stores and their use is not so restricted.

Petitioner filed a complaint in the District Court alleging it had done business with the defendant for a number of years, and that defendant had discontinued sales to the plaintiff allegedly because of plaintiff's price cutting. Defendant filed a full and responsive answer setting forth that plaintiff's sales to the general public of potentially dangerous products intended for professional use only exposed defendant to F.D.A. and public liability.

On deposition, defendant's witnesses stated directly and bluntly that the sole and only reason for discontinuing dealing with the petitioner was the undenied fact that the general public was invited to plaintiff's establishment to purchase defendant's products required to be applied only by professional users.

It was also made perfectly clear that harm could result to an unskilled user of these products, thereby imposing liability on the manufacturer.

At no time was there any effort made by the plaintiff to demonstrate or introduce any evidence in the case at all that the refusal to continue to deal was based upon a restriction on price resale. None of the containers of these various products restricted for resale to professional customers had on it any price or suggested price. There was no attempt to prove that the dealers who purchased our products were to ask or charge any specific price. Plaintiff had in answer to its interrogatories a list of 17 dealers in this Philadelphia area to whom we sold our products for resale by those dealers to professional users. Not one of those dealers was called by the plaintiff to establish either that there was a suggested price or a fixed price or that any attempt at sanction was suggested. In short, plaintiff abandoned that theory.

Plaintiff's president, however, admitted on deposition that he ignored the warning labels, and freely advertised and sold defendant's professional products to the general public.

Defendant sought and obtained summary judgment.

ARGUMENT.

I. THE ISSUE HERE IS APPLICABLE ONLY TO THESE LITIGANTS.

The issue before the Court in the present case is uniquely limited to the specific parties based upon this particular set of facts and cannot by any stretch of contrived semantics be converted into a matter of constitutional application wanting review by this Court.

The question which petitioner seeks to have reviewed is simply a result of the unique set of facts involved in the litigation, and the admissions wrung from plaintiff's chief executive on deposition. Since all the facts were exposed on deposition and plaintiff sought vainly to show only that defendant harbored an *unexpressed intent* to fix prices, the matter was perfectly suited for summary judgment.

Thus, we submit, the matter is of little moment nationally, and is ill founded for consideration by the Supreme Court. Rule 19, Supreme Court Rules, *Graver v. Linde*, 336 U. S. 271, 275.

The decision in the instant case is hardly in conflict with *United States v. Arnold Schwinn & Co.*, 388 U. S. 365 (1967), as asserted by petitioner. As pointed out by the majority of the Court of Appeals, the restraint complained of was clearly *in the public interest*, and required by the F. D. A. Imagine a manufacturer's dilemma were the Court to have

held otherwise. In no way can judicial pronouncements regarding sales of bicycles become precedent for regulated procedures controlling the distribution of dangerous drugs and cosmetics applied to the human head.

Thus, we submit, there is no conflict between *Schwinn* and the instant case, since they are factually inapposite, and there is no reason to consider the controversy further.

II. THE DECISION OF THE COURT BELOW WAS EMINENTLY CORRECT.

(a) The plaintiff failed to plead or support a cause of action. In spite of its fatally defective pleading, the District Judge reviewed the entire record with a broad generous interpretation, but found nothing to carry the plaintiff to trial. After exhaustive discovery by deposition of defendant's personnel, plaintiff was unable to supply a single shred of support to its naked assertion in the complaint that the *unexpressed animus* of the defendant in refusing to deal further was that of price fixing.

Not one of the other distributors was deposed by plaintiff, nor its affidavit produced to affirm plaintiff's belief. No conspiracy was alleged or shown, nor could plaintiff itself assert an actionable course of communication or conduct. The issue groaned to a halt when plaintiff admitted its sales to the public of clearly restricted commodities.

Thus assuming it legal to sell dynamite to a building supply house, the manufacturer would be sore distressed to find the distributor selling it indiscriminately to the general public for use in tree stump removal.

There is no doubt that plaintiff petitioner, by reselling to non-professionals exposed the public to danger, and the defendant to products liability litigation.

FRUMER & FRIEDMAN, 3 Products Liability (1967 Supp. pp. 80, 81).

Helene Curtis v. Pruitt, 385 F. 2d 841 (C. A. 5th), *cert. denied*, 391 U. S. 913 (1968).

Kassad v. Central Soya Corporation, 432 Pa. 217 (1969).

(b) *The refusal to deal unaccompanied by any conspiracy or attempted monopolization or any price fixing is still the right of the manufacturer.* This petitioner had no contract of any kind or character with defendant which was breached by the defendant. It was merely a case of discontinuance of dealing based solely upon the fact that this dealer by his conduct was imposing a potential liability upon the manufacturer by the sale of products without adhering to the restrictions on the containers, and which sale admittedly could cause injury to a non-professional.

Quinn v. Mobil Oil Co., 375 F. 2d 273 (C. A. 1), *cert. denied* 389 U. S. 801 (1967).

(c) *There was no issue of fact to be determined by the lower Court.* Summary judgment was appropriate because:

(1) There was no attempt to support his complaint in any way.

(2) There was no attempt to deny the fact that petitioner was selling our dangerous merchandise for public consumption contrary to the restrictions imposed upon them for the safety of the public and, indirectly, the manufacturer.

CONCLUSION.

The conflict between *Schwinn* and *Tripoli* being illusory, or, more aptly, non-existent, and the plaintiff having failed to exhibit a shred of support for its faintly asserted suspicions, the holdings below were clearly correct.

We respectfully urge the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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